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In the Supreme Court of the United States

Term 1979

No. 78-1896

ROBERT KAHN, NOEL PERRY, STANLEY
NEPARST,

Petitioners,

VS.

THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF ALAMEDA COUNTY,
Respondent;

THE EAST BAY MUNICIPAL UTILITY
DISTRICT,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MOSS & MURPHY
By: GLEN L. MOSS

22693 Hesperian Boulevard
Suite 175
Hayward, California
Telephone: (415) 785-5266

Attorneys for Petitioners

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
A. Summary of Facts.....	3
B. Procedural Summary of Litigation.....	6
Reasons for Granting the Writ	
A. The opinion of the California Supreme Court conflicts with the Federal Voting Rights Act (42 U.S.C. §1973) and denies non-English speaking voters equal protection of law....	7
B. Requiring candidates to absorb a significant portion of the State's election costs will discourage political participation by all citizens, and denies candidates equal protection of law	8
Conclusion	13
Appendix A	15
Appendix B	25
Appendix C	39
Appendix D	45
Appendix E	61

TABLE OF AUTHORITIES CITED

CASES

Bullock vs. Carter 405 U.S. 134 (1972)	10, 11
Garza vs. Smith 320 F.Supp. 131 (W.D. Tex. 1970)	8
Johnson vs. Hamilton (1975) 15 Cal.3d 464, 125 Cal. Rptr. 129.....	8
Knoll vs. Davidson (1974) 12 Cal.3d 335, 116 Cal. Rptr. 97....4, 9, 10, 12	
Lubin vs. Panish (1974) 415 U.S. 709.....	9, 10
Puerto Rican Organization for Political Action vs. Kusper 350 F.Supp. 606 (N.D. Ill. 1972).....	8

TABLE OF AUTHORITIES CITED (Continued)

CODES	Page
California Election Code §10012.....	2, 3, 4, 8, 9, 10, 11, 12
California Election Code §10012.5	10
<hr/>	
RULE	
California Rules of Court, rule 24(a).....	2
<hr/>	
TEXTS	
28 U.S.C. §1257(2)	2
28 U.S.C. §1257(3)	2
42 U.S.C. §1973.....	3, 7, 8
42 U.S.C. §1973(f).....	5, 7

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DISTRICT,
Real Parties in Interest.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

Petitioners, Robert Kahn, Noel Perry, and Stanley Neparst respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of California entered on March 27, 1979, and which became final as to that Court on April 27, 1979.

OPINIONS BELOW

The final judgment of the California Supreme Court [App. A. p. 15] is reported at Sup. 153 Cal.

Rptr. 597 (April 20, 1979). The majority opinion reversed the opinion of the Court of Appeal First District, Division Four, which was issued April 4, 1978. The unanimous opinion of the Court of Appeal for the First District, Division Four (App. B. p. 25, is reported at App. 144 Cal. Rptr. 845). The unreported opinions of the Appellate Department of the Superior Court are attached as Appendix C and D.

JURISDICTION

The judgment of the California Supreme Court was entered March 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §1257(3). The judgment of the California Supreme Court became final April 27, 1979 pursuant to California Rules of Court, rule 24(a).

QUESTION PRESENTED

Whether municipal utility districts, and other non-partisan local agencies in California may successfully shift the costs of printing, handling, and translating the official candidate statements which are transmitted by said agency with the ballots submitted to the voters. California Election Code §10012 provides that each candidate for non-partisan elective office in any local agency including any city, county or district may prepare a candidate statement on an appropriate form provided by the clerk. Such statement shall be filed in the office of the clerk when his nomination papers are returned for filing. The clerk has a man-

datory duty to send each registered voter together with the sample ballot a voters pamphlet which contains these statements. It is the contention of petitioners that the State may not constitutionally shift these expenses since they are an integral part of the election process.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The California Election Code §10012.

United States Constitution, Fourteenth Amendment and First Amendment.

Voting Rights Act of 1965, 42 U.S.C. § 1973.

STATEMENT

A. Summary of Facts

Each of the petitioners was an unsuccessful candidate for a seat on the Board of Directors of the East Bay Municipal Utility District in the 1974 general election. This office carried no salary, and a maximum remuneration for the entire four year term of \$1,920.00. This sum consisted of the per diem received by each director upon his actual attendance at the regularly scheduled meetings of the Board of Directors. The job itself provides absolutely no salary or other fringe benefits except the satisfaction of knowing that one is making a real contribution to the operation of local government. At the time each petitioner

filed his application, he also submitted a statement in the form approved by California Election Code §10012. At this time, each candidate was advised that he would be required to deposit \$2,600.00 for the English version of the candidate's statement, and an additional \$2,600.00 if he wished the statement to be translated into Spanish, and distributed to the extensive Spanish speaking population in his district. Before depositing this sum, the California Supreme Court decided the case of *Knoll vs. Davidson* (1974) 12 Cal. 3d 335, 116 Cal. Rptr. 97. In this decision, the Supreme Court held that it was unconstitutional to require the collection of the charges as a condition precedent to distribution of the candidate statement. (See section three of *Knoll vs. Davidson*, *supra*.)

Shortly after the general election, each petitioner received a bill from the East Bay Municipal Utility District for the cost of his candidate statement. Pursuant to regular resolutions of the Board of Directors, petitioners Kahn and Neparst were billed \$1,300.00 each since they requested a Spanish translation of their candidate statement. Defendant Perry was billed the sum of \$650.00 since he did not request that his statement be translated into Spanish. (Findings of fact numbers 6 and 10.) No explanation was afforded any petitioner regarding the reason why the ultimate bill was less than the original amount demanded. At the trial, it was conceded that petitioners Kahn and Neparst were willing to translate their statements into

Spanish at no charge to the district. Such translations would be by professors in the Spanish Department at the University of California at Berkeley. This offer was rejected by the district, which contended that only the clerk's office could translate the statement into Spanish, and that petitioners should be billed for this charge. Since the maximum length of the statement is two hundred words, it is apparent that the translation charge exceeded \$3.00 per word.

The amount of the charges to candidates is essentially an arbitrary matter. As indicated in Appendix E, attached herein, other state agencies have charged candidates over \$21,000.00 for distribution of the same candidate statements referred to in the instant litigation. The only limit on the size of the bill is specified in California Election Code §10012. In this section, it is specified that the total cost cannot exceed the amount actually paid by the affected local agency. However, there are no limitations in the statute regarding the amount the agency pays, or can pass on to individual candidates for printing, translating or handling these statements.

During the pendency of this action, Congress passed the Federal Voting Rights Act of 1975 42 U.S.C. § 1973(f) which, *inter alia*, prohibits charges for Spanish or other foreign language translations of official ballot statements. Nevertheless, the California Supreme Court upheld the entire charge, including

the differential for the Spanish translation. This decision came after extensive lower court proceedings at which we alleged the translation charge violated the Voting Rights Act.

B. Procedural Summary of Litigation

The Municipal Court upheld the claim of the district, and awarded judgment in its favor for the total amount of the prayer. Petitioners appealed to the Appellate Division of the Superior Court, which reversed. (App. C p. 39). The district then sought a rehearing before the Appellate Division which was granted. The new panel of the Appellate Division again reversed the Municipal Court by a two-one vote and issued an opinion (App. D p. 45) which sought to transfer the matter to the First Appellate District of the Court of Appeal, Division Three. In an unreported opinion the Court of Appeal, Division Three affirmed the decision of the Appellate Division of the Superior Court. Real party in interest then sought a hearing in the California Supreme Court which was granted on October 27, 1977 in an unpublished order. The California Supreme Court transferred the matter for further hearing to Division Four of the Court of Appeal, First Appellate District. That Court heard argument and considered briefs on the matter, after which it issued a published opinion which is set forth in Appendix B. The district then sought a review with the California Supreme Court, which was again granted. This time, the California Supreme Court heard the matter itself.

With a split decision, it reversed the opinion of Division Four (Appendix A). Petitioners now seek a Writ of Certiorari in this Court for consideration of the important Federal questions and constitutional issues involved.

REASONS FOR GRANTING THE WRIT

A. The opinion of the California Supreme Court conflicts with the Federal Voting Rights Act (42 U.S.C. §1973) and denies non-English speaking voters equal protection of law.

At trial, we made the argument that Spanish voters are denied the protections of the Federal Voting Rights Act (42 U.S.C. §1973) by the provision charging additional fees to candidates wishing their statements to be distributed in Spanish. (Plaintiff's opening brief, pp. 3-5). This legislation, specifically prohibits a State or political subdivision from denying or abridging the rights of Spanish speaking voters to receive voting notices, forms, instructions or other materials relating to the electoral process in their native language. This section applies since more than 5% of the registered voters in Alameda and Contra Costa Counties of the State of California are Spanish speaking. [See generally 42 U.S.C. §1973(f)].

Numerous lower Federal Courts have concluded that any system for distributing candidate materials or voting qualifications which effectively denies Spanish voters access to them, violates the Fourteenth Amendment to the United States Constitution. [e.g. *Puerto*

Rican Organization for Political Action vs. Kusper 350 F. Supp. 606 (N.D. Ill. 1972); *Garza vs. Smith* 320 F. Supp. 131 (W.D. Tex. 1970)]. In the instant case California Election Code §10012 imposes a clear monetary penalty on candidates who wish their views to become known to the Spanish speaking electorate.

The penalty was \$650.00 for the privilege of having a two hundred word statement distributed in Spanish as well as English. Throuhgout the checkered history of this case, we have argued that such discrimination was improper since it denied Spanish speaking voters the equal protection of the laws, as well as violating the specific prohibitions of the Voting Rights Act contained in 42 U.S.C. § 1973.

B. Requiring candidates to absorb a significant portion of the State's election costs will discourage political participation by all citizens, and denies candidates equal protection of law.

A disturbing aspect of the current political climate is voter apathy. The California Supreme Court has taken judicial notice of this problem in a recent case challenging the candidate residency requirement imposed by the City of Long Beach. (*Johnson vs. Hamilton* (1975) 15 Cal. 3d 464, 125 Cal. Rptr. 129.) Unfortunately, the decision of that Court in the instant case will only accelerate this problem by preventing candidates for non-partisan offices from presenting their views in even skeletal form to the voters. The financial cost falls only on the challengers who seek to introduce new solutions to local problems. If

allowed to stand, the instant decision will prevent voters from considering these views unless the candidate is willing to shoulder the burden of financing the official voters' pamphlet which is distributed to the voters along with the official ballot. The California Supreme Court has recognized that it is unconstitutional to permit the imposition of the fees levied pursuant to Election Code §10012 *prior* to the election. (*Knoll vs. Davidson* (1974) 12 Cal. 3d 335, 116 Cal. Rptr. 97.) Unaccountably, the instant decision permits the collection of the identical charges immediately after the election. The burden on the candidate is identical whether the sheriff executes on his bank account or otherwise impresses a lien on his property for collection of these fees before or after the election takes place.

We recognize that the state has a legitimate interest in minimizing its operating expenses. The Court of Appeal decision in this case, Appendix B, provides a constitutionally acceptable method of protecting this interest. The California Supreme Court ignores the important right of the candidates to present their views to the voters. This right was recently recognized by this court in *Lubin vs. Panish* (1974) 415 U.S. 709.

Lubin vs. Panish, *supra*, challenged the California filing fee system on the ground that it deprived voters of access to the political views of candidates

unable to meet the financial burden of their fees. The fees discussed in *Lubin vs. Panish* were required of a candidate prior to the election. This fact was recognized in *Knoll vs. Davidson*, *supra*, to support the decision that the County of Alameda could not constitutionally require the pre-payment of the candidate's statement fee required by Election Code §10012 (formerly Election Code §10012.5). However, the words of this Court in *Lubin vs. Panish*, will become hollow indeed if a State can avoid their effect merely by charging the filing fee or candidate's statement fee after the election.

In *Bullock vs. Carter* [405 U.S. 134 (1972)] this Court was confronted with the filing fee scheme of the State of Texas. Like the scheme of California, Texas required individual candidates to essentially subsidize a large portion of election costs. This Court rejected that scheme with the observation that, "the financial burden for general elections is carried by all tax payers and appellants have not demonstrated a valid basis for distinguishing between these two legitimate costs of the democratic process . . ." (*Bullock vs. Carter*, *supra*, at 148). In the instant case, California seeks to render the primary and general elections equal by shifting the burden of *both* elections to the candidates. This method of achieving equality ignores the fact that the conduct of an election is a cost for all citizens of a democratic republic. Elections are not conducted merely for the benefit of

the wealthy or other favored few who have the economic resources to absorb the financial burden. As this Court observed in *Bullock vs. Carter*:

Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the State interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters. (*Bullock vs. Carter*, *supra*, 148.)

The fees being attacked in the instant case are considered more egregious than those condemned by this Court in *Bullock vs. Carter*. Unlike the Texas scheme, the California Election Code §10012 provides no specific standards to limit the expenditures by the State which can then be shifted to the non-incumbent candidates. In contrast, Texas did provide such standards. [FN 9 and 10, *Bullock vs. Carter*, *supra*]. In that case, the standards were based on the remuneration a successful candidate received if elected to office. In contrast, the instant candidates were assessed fees of \$650.00—plus an additional \$650.00 to include a Spanish translation when the job carried no salary whatever. Even if they attended all the directors meetings the annual compensation would be only \$480.00. As indicated by exhibit E,

other candidate's for non-partisan office have been required to pay even higher fees.

California has provided no reasonable alternative to the candidate's statement set forth in Election Code §10012. This statement is distributed by the Registrar of Voters along with the ballot in an officially titled voters pamphlet. The California Supreme Court itself recognized that the Statement is clearly distinguishable from normal campaign literature. Specifically, the Court held:

The voters pamphlet, which accompanies the sample ballot, purports to be an authoritative document that appears to give an imprimatur of official approval to statements of qualifications included therein. It is quite likely that this document would carry greater weight in the minds of voters than normal campaign literature and that candidates who do not have their statements of qualifications in it would appear to be lacking in official sanction. In short, it seems likely that candidates who have their statements of qualifications included in the voters pamphlet have a clear advantage over candidates who do not. [Knoll vs. Davidson 12 Cal. 3d at 352, 116 Cal. Rptr. at 108.]

Despite this recognition of the importance of the candidate's statement, and its uniqueness, the candidate's financial position now governs whether this statement is included in the voters pamphlet. This

denies candidates their First Amendment rights to petition the government for redress of grievances. Such denial occurs since the State is imposing a significant financial burden on a citizen's right to have his views considered by the electorate.

CONCLUSION

For the above reasons, it is respectfully requested that this Court grant a Writ of Certiorari for the purpose of reviewing the decision of the California Supreme Court.

Dated: June 8, 1979.

Respectfully submitted,

Moss & Murphy
By: GLEN L. MOSS
Attorneys for Petitioners

APPENDIX

APPENDIX A

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

Filed March 27, 1979, G. E. Bishel, Clerk

EAST BAY MUNICIPAL UTILITY DISTRICT,
Petitioner,

v.

THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF ALAMEDA COUNTY,
*Respondent;*ROBERT KAHN, et al.,
*Real Parties in Interest.*S.F. 23675
Super. Ct.
No. 943

Petitioner East Bay Municipal Utility District (EBMUD) seeks review of an order by respondent Appellate Department of Alameda County Superior Court reversing municipal court judgment in favor of EBMUD against real parties in interest. We conclude respondent court erred and we set aside its order of reversal.

Real parties in interest in the underlying municipal court action were candidates for EBMUD's board of directors in the 1974 general election. Each asked that his statement of qualifications for office be included in the voter pamphlet distributed to the electorate prior to election. (See former Elec. Code,

§ 10012.5, now § 10012 (Stats. 1975, ch. 1158, § 19, p. 2854.) After the election EBMUD billed each candidate a pro rata share of expenses for the pamphlet.¹ Real parties refused to pay and EBMUD commenced the underlying action.² Judgment was rendered for EBMUD in the amounts charged plus interest.

Appeal by defendants to respondent court resulted in reversal of judgment on the ground that enforcement of collection is constitutionally prohibited. However, respondent court certified that transfer of the cause to the Court of Appeal appeared necessary to secure uniformity of decision on a matter of statewide concern. (See Code Civ. Proc., § 911; Cal. Rules of Court, rule 63(a).) The Court of Appeal rejected certification and EBMUD commenced the instant proceedings.³

¹The pro rata charge was \$650 for each statement plus \$650 for each language translation of the statement. The amount charged is not in issue.

Former section 10012.5 provided in pertinent part: "The local agency [EBMUD] may bill each candidate availing himself of these services a sum not greater than the actual prorated costs of printing, handling, and translating, if any incurred by the agency as a result of providing this service. Such costs shall not include any charge for mailing. Only those charges may be levied with respect to the candidate's statement and each candidate using those services shall be charged the same."

²This is not a case in which real parties seek to avoid payment of lawful obligations on grounds of indigency or other inability to pay. None of the real parties in interest—defendants in the underlying action—claims they are without the financial means to pay their pro rata share of proper costs.

³A writ of review issued and the parties are now before us in a certiorari proceeding. (See Code Civ. Proc., §§ 1067, 1071.) For reasons appearing, we deem that respondent court has acted in excess of jurisdiction within the meaning of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 462 (see also 5 Witkin, Cal. Procedure (2d ed. 1971) § 10, p. 3787) by its failure to comply with directions contained in Elections Code section 10012.1 and *Knoll v. Davidson* (1974) 12 Cal.3d 355. The question is whether the appellate "judgment" of respondent court is to be affirmed or annulled.

We must determine the applicability of *Knoll v. Davidson*, *supra*, 12 Cal.3d 335, to the issue before us. In *Knoll* the court dealt with Elections Code section 10012.5 (now § 10012). The statute was challenged on the ground it invidiously discriminated against poor candidates, denying equal protection. This court recognized that candidates whose statements of qualifications were included in the voter pamphlet possessed an advantage over candidates unable to prepay printing costs. The court concluded the governmental agency may not constitutionally require prepayment of costs as a condition to printing statements of qualifications. The court held the condition constituted an invidious discrimination favoring wealthy people. But the court recognized the agency's interest in securing payment for services rendered, concluding the statute "permits the local agency to bill, at its option, each candidate, who has had a statement of qualifications included in the pamphlet, for his pro rata share of the actual costs of printing and handling, after the voter's pamphlet has been printed and distributed." (*Id.* at p. 353.) The court also stated "that although prepayment of the prorated cost . . . may not be constitutionally required, the statute in question constitutionally permits the candidate to be billed for such cost after the voter's pamphlet has been printed and distributed." (*Id.* at p. 338.)

Real parties contend that language in *Knoll* relative to the power of a local agency to bill for pamphlets

phlet costs *after* publication and distribution is only dicta and is inconsistent with *Knoll's* prepayment prohibition. However, *Knoll* concerned the inequality resulting when only those candidates able to prepay costs present their qualifications to the voters through the official voter pamphlet. Inequality is eliminated when all candidates are permitted to make a statement of qualifications without prepayment. Equal protection does not further require that candidates be relieved of their pro rata costs of publication any more than they are entitled to relief from other personal costs of candidacy. Certainly there is nothing in either *Knoll* or in other equal protection concepts requiring reconsideration of our holding that a local agency may bill a candidate, after distribution of the voter pamphlet, for pro rata sharing of publication and distribution costs. We view the challenged language in *Knoll* not as dicta but as defining the limits of our holding, and we reaffirm that holding.

It is further contended that while the statute provides a local agency may bill a candidate his pro rata costs, it may not enforce collection by legal action. Such interpretation of the statute would effectively repeal it, as collections could be made only from those candidates who voluntarily pay their publication costs—an election they can make with or without the statute. A statute, of course, must be construed toward giving it meaning and effect. (See *Mercer v. Perez* (1968) 68 Cal.2d 104, 112; Code Civ. Proc., §§ 1858, 1859.) While not address-

ing the issue directly in *Knoll*, this court held that the statute, served a useful function. “[W]e do not deem it necessary to strike down section 10012.5, because, as we read the statute, it . . . permits the county to subsequently bill the actual cost of providing the services once the services contemplated by the statute have been provided.” (*Knoll v. Davidson*, *supra*, 12 Cal.3d 335, 352.)

While the statute expressly confers a power only to “bill” at the discretion of the local agency, we deem the Legislature to have intended that power to include collection through access to the courts.⁴ We endorsed such a construction of the statute in *Knoll*. “It appears that *the county need not be compelled to pay the cost of providing this service* of printing and mailing candidates’ statements of qualifications and that, as indicated in [*Bullock v. Carter* (1972) 405 U.S. 134], the county has a legitimate state interest in *collecting* the actual cost of providing such a service.” (*Knoll v. Davidson*, *supra*, 12 Cal.3d 335, 351, *italics added*.)

Real parties also claim that aside from statutory considerations, constitutional prohibitions preclude collection of prorated charges for the voter pamphlet. While acknowledging that the “government has no obligation to finance the campaign expenses of individual candidates,” they claim the cost of the pam-

⁴In addition to billing, the statute speaks of “charges” which may be “levied,” thus inferring the creation of a legal obligation rather than merely a sterile “right” to bill. (Fn. 1, *ante*.)

phlet statement is not a campaign expense but instead part of the cost of a "free election" which the state is constitutionally obligated to provide.⁵ According to real parties the right to a "free election" does not distinguish between elector and candidate expense and the issue is "whether the particular candidate's statement under consideration should be viewed as an election expense, or a campaign expense."

In urging the cost of a statement be deemed an election expense, real parties argue that EBMUD is effectively a corporate public utility, that such corporations are able to charge the cost of proxy statements for election of its directors, and that the public customers of the utility eventually pay the cost of such statements since all proper expenses are accounted for in rates fixed by the Public Utilities Commission. That being the case, real parties argue, if EBMUD were privately owned, the rate-paying public "would be required to pay those expenses of the candidate statements roughly equivalent to those contained in the ballot information [pamphlet] furnished by" EBMUD.

If real parties contend—as they appear to—that on some theory of equal protection a candidate for the board of directors of a municipal agency is not to be charged for his or her statement in a voter

⁵California Constitution, article II, section 3, now article II, section 2, provided in 1974: "The Legislature shall define residence and provide for registration and free elections."

pamphlet because candidates for the board of directors of a corporate utility are not charged for a proxy statement published to shareholders, the contention is totally lacking in merit. Legislative treatment of a privately funded corporate utility entitled under law to a profit based on a reasonable rate of return on its investment, cannot rationally determine the standard of legislative treatment of a public agency not funded by private investment and not operated for profit. If the cost of proxy statements may lawfully be borne by the corporate utility, there is no fundamental compulsion requiring the cost of voter pamphlet statement be borne by the municipal agency. The state may—if as here it elects to do so—rationally provide discriminatory rules affecting the two agencies and the costs associated with the election of its governing body, because there are rational and fundamental distinctions in the classifications created. The state has done that here—former section 10012.5 governs the cost of voter pamphlet statements for candidates to the board of EBMUD and, as we have seen, requires candidates not claiming indigency to bear that cost.

If it is real parties' contention the regulation denies them or electors access to the ballot, the contention is equally without merit.⁶ Here there is no denial of access

⁶As stated, real parties agree they are not entitled to public financing of their campaign. Such issue was put to rest in *Buckley v. Valeo* (1976) 424 U.S. 1. It is established in *Buckley* that equal protection does not require government finance campaigns of candidates of minor parties, even though government provides funds to major party candidates.

to the electoral process, as in the case of laws requiring a candidate to satisfy certain conditions in order to place his or her name on the ballot. (See *American Party of Texas v. White* (1974) 415 U.S. 767; *Storer v. Brown* (1974) 415 U.S. 724; *Labin v. Barish* (1974) 415 U.S. 709).¹ Such requirements constitute "direct burdens not only on candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues." (*Buckley v. Valeo*, *supra*, 424 U.S. 1, 94.) Here, as in *Buckley*, the government's refusal to pay candidate campaign costs "is not restrictive of voters' rights and less restrictive of candidates'." (*Id.*) The regulation "does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice. . . ." (*Id.*) Our holding in *Knoll v. Davidson*, *supra*, 12 Cal.3d 335 disallows any legitimate claim that former Elections Code section 10012.5 denies real parties access to the ballot.

Finally, if real parties simply contend the cost of the personal qualifications statement is part of the public expense of a "free election" provided for in article II, section 2 (see fn. 4, *ante*), that contention is also rejected. A "free election" does not mandate a free ride from all election campaign expense and particularly not from the pro rata cost of publicizing personal qualifications for the office one seeks.

¹Even in *Knoll v. Davidson*, *supra*, 12 Cal.3d 335 — wherein prepayment charges were a condition to appearing on the ballot — this court did not consider access to the ballot as an issue of constitutional infirmity. The practices there were struck down on equal protection grounds. (*Id.*, at pp. 351-353.)

We conclude Elections Code section 10012.5 (now § 10012) allows collection by a local agency of pro rata charges for publishing and distributing candidates' statements of qualifications in the voter pamphlet, when such charges and collections are effected after distribution of the pamphlet.

The appellate judgment of respondent court is annulled, and that court is directed to affirm the trial court's judgment in the underlying action.

CLARK, J.

WE CONCUR:

TOBRINER, J.
MOSK, J.
RICHARDSON, J.
MANUEL, J.

EAST BAY MUNICIPAL UTILITY DISTRICT v.
THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF ALAMEDA COUNTY

S.F. 23675

DISSENTING OPINION OF NEWMAN, J.

I dissent. The majority opinion states, "A 'free election' [guaranteed by article II, section 3 of the California Constitution] does not mandate a free ride from all election campaign expense and particularly

not from the pro rata cost of publicizing personal qualifications for the office one seeks."

By no means does this case involve "a free ride from all election campaign expense." It involves government action, government financing. In my view an election is not free, within the meaning of article II, section 3, if a government is allowed to assess any of its costs to the candidates.

NEWMAN, J.

I AGREE:
BIRD, C.J.

APPENDIX B
IN THE
COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

Filed April 4, 1978, Clifford Porter, Clerk

EAST BAY MUNICIPAL UTILITY DISTRICT,
a body corporate and politic of the
State of California,

Petitioner,

VS.

THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, FOR THE COUNTY OF ALA-
MEDA,

Respondent,

ROBERT KAHN, STANLEY NAPARST, and
NOEL A. PERRY, as individuals,

Real Parties in Interest.

1 Civil
No. 42284
(Sup. Ct.
No. 943
Appellate
Dept.)

In the "Petition For Writ of Certiorari And/Or . . . Mandamus" with which it commenced this proceeding, petitioner East Bay Municipal Utility District seeks an appropriate writ which would in effect set aside an appellate decision of respondent court.

At relevant times in and after 1974, Elections Code section 10012.5 provided that a candidate for elective office in any "local agency . . . or district" might prepare and file a written statement of his qualifications for the office, subject to specified editorial limitations; that a voter's pamphlet, including all such statements prepared and filed, was to be sent to the affected electors with the sample ballot required by law; and that "[t]he local agency may bill each candidate availing himself of these services" for his share of certain prorated costs actually incurred by the agency in providing them.¹

In *Knoll v. Davidson* (1974) 12 Cal.3d 335, the Supreme Court held (among other things to be described) that constitutional guaranties of equal protection precluded a local agency from requiring a candidate to prepay his share of these costs as a condition of his statement of qualifications being included in the voter's pamphlet. (*Id.*, at p. 352.) The reasons

¹In 1974, the pertinent context of the statute read as follows:

"10012.5. Each candidate for elective office in any local agency, city, county, city and county or district *may* prepare a statement of qualifications on an appropriate form provided by the clerk. Such statement may include the name, age and occupation of the candidate and a brief description of no more than 200 words, of the candidate's education and qualifications expressed by the candidate himself. . . . Such statement shall be filed in the office of the clerk when his nomination papers are returned for filing. . . .

"The clerk *shall* send to each voter together with the sample ballot, a voter's pamphlet which contains the written statements of each candidate's qualifications that is prepared pursuant to this section. . . .

"The local agency *may* bill each candidate availing himself of these services a sum not greater than the actual prorated costs of printing, handling, and translating, if any [,] incurred by the agency as a result of providing this service. Only those charges may be levied and each candidate using these services shall be charged the same. . ." (Italics added.)

This language appeared in the statute as amended in 1971. (Stats. 1971, ch. 1298, § 1, p. 2546.) Since 1974, it has been amended again and renumbered as section 10012 of the Elections Code. (Stats. 1975, ch. 1158, § 19, p. 2854.)

for this holding, as expressed in its context (also to be described), were that the statute did not "authorize" the exaction of prepayment, that it *compelled* the local agency to include in the voter's pamphlet all candidates' statements which met its editorial requirements, and that it "permits the local agency to bill, at its option, each candidate" who has had a statement included. (*Id.*, at pp. 352-353 [original italics].)

Petitioner is a municipal utility district organized and functioning pursuant to statute (Pub. Util. Code § 11501 et seq.) under the management of elected directors. (*Id.*, §§ 11821-11866.) For purposes of their election, it is both a "local agency" and a "district" within the meaning of Elections Code section 10012.5. (See fn. 1, *ante*.) We hereinafter refer to it as the "District."

At least one seat on the District's board of directors was contested at an election which was consolidated with the statewide general election conducted on November 4, 1974. (See Pub. Util. Code, §§ 11825, 11829.) The candidates included real parties in interest Kahn, Naparst and Perry. Each of them filed a statement of his qualifications pursuant to section 10012.5. The statement of each was included in the voter's pamphlet sent to the electors in the District. Prepayment of the incidental costs was not required of any of the three, and the District subsequently billed each for his share of the costs. This procedure was followed upon the authority of the holding in

Knoll v. Davidson, supra, and in accordance with a pre-election board resolution which said so.

Each of the three real parties declined to pay his bill. The District thereupon brought a collection action against all three, and recovered a money judgment against each, in an Alameda County municipal court. Real parties appealed the judgment to respondent court, which reversed it with one judge dissenting. The majority held, upon the basis of their interpretation of the *Knoll* holding, that section 10012.5 could not constitutionally permit *enforced collection* of the costs for which it authorized the local agency to "bill" affected candidates. In the present proceeding, which followed (among others) and has reached this court for disposition, the District contends that respondent misinterpreted the *Knoll* holding and that its decision should accordingly be annulled, as an excess of its jurisdiction, pursuant to *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.² We are required to examine *Knoll* in some detail, as follows:

² Respondent court initially certified the cause to this Court of Appeal pursuant to section 911 of the Code of Civil Procedure and Rule 63, California Rules of Court. Another division of this court denied certification. The District thereupon filed its present "Petition For Writ of Certiorari And/Or . . . Mandamus" in the Supreme Court, seeking in effect (and among other things) a writ directing respondent court to certify the cause to this Court of Appeal again. The Supreme Court transferred the petition to this court, it reached this division in due course, and we denied it. The Supreme Court granted the District's petition for hearing and ordered the cause retransferred to this court (and this division) "with directions to issue a writ of review." We complied. Since we issued a "writ of review" as directed, the parties are now before us in a certiorari proceeding. (See Code Civ. Proc., §§ 1067, 1071.) The question is whether the appellate decision of respondent court, treated as its "judgment," is to be affirmed or annulled. (*Auto Equity Sales, Inc v. Superior Court, supra*, 57 Cal.2d 450 at pp. 455, 462; 5 Witkin, California Procedure (2d ed. 1971) Extraordinary Writs, § 10, p. 3787.)

The *Knoll* court granted relief in a mandamus proceeding which had been commenced in the Court of Appeal by a petitioner who challenged the constitutionality of two separate requirements of law which frustrated her desire to become a candidate for elective office in Alameda County. (12 Cal.3d at pp. 338-339.) She first contended that she was denied equal protection of the laws by the system (then prescribed in Elections Code sections 6551 through 6555) which required, as the exclusive prerequisite to her becoming an official candidate, the payment of a filing fee she could not afford. (Pp. 338-339, 344.) Sustaining this contention in part II of its opinion (pp. 344-349), the court analyzed two decisions of the United States Supreme Court (*Bullock v. Carter* (1972) 405 U.S. 134 and *Lubin v. Panish* (1974) 415 U.S. 709) and held, under the "compulsion" of both, that in the acknowledged absence of provisions for "a reasonable alternative means of access to the ballot" the system and the underlying statutes were unconstitutional upon equal protection grounds as claimed. (Pp 349.)

In part III of its opinion (12 Cal.3d at pp. 350-353), the court considered the petitioner's contention that she was also denied equal protection of the laws by an Alameda County requirement that she *prepay*, in accordance with a schedule of prescribed "fees," her estimated share of section 10012.5 costs (which she was also unable to pay) as a condition precedent to having her statement of qualifications included in

the voter's pamphlet to be printed and distributed by the county. (Pp. 339, 351.) The court resolved this contention in four successive passages. Because the issue in the present proceeding turns upon an interpretation of the precise language used in these passages, we summarize and quote them as follows (12 Cal.3d at pp. 351-353):

(1) "It appears clear that the county need not be compelled to pay the cost of providing this [section 10012.5] service . . . and that, as indicated in *Bullock*, the county has a *legitimate state interest in collecting the actual cost* of providing such a service." (Italics added.) (2) "However, it appears equally clear that the county cannot constitutionally make this service available only to affluent candidates, while denying it to less affluent ones. (Citations.)"

(3) The quasi-official nature of a candidate's statement of qualifications, as printed under the ostensible "imprimatur" of the voter's pamphlet, gives the candidates who have their statements included "a clear advantage over those who do not." "It is impermissible for the state or local agency involved to deny this opportunity solely on the basis of wealth, thereby giving an unfair advantage to the affluent and invidiously discriminating against those unable to afford the substantial fees." For this reason, the agency "cannot constitutionally require that a candidate pay . . . his pro rata share of the printing and handling costs as a condition to having his statement of qualifi-

cations included in the voter's pamphlet." (Italics added.)

(4) "However, we do not deem it necessary to strike down section 10012.5, because, as we read the statute, it does not authorize such a prepayment system, but only permits the county to subsequently bill the actual cost of providing the services once . . . [they] . . . have been provided. . . . *Nowhere does it compel the local agency to collect the actual cost. . . .*" (Italics added.) It "compels the local agency to include in the voter's pamphlet each candidate's statement of qualifications which conforms to . . . [its editorial standards] . . . and permits the local agency to bill, at its option, each candidate . . . for his pro rata share of the actual costs of printing and handling, after the voter's pamphlet has been printed and distributed." (Original italics.)

In passage no. (3), which reiterated some of the substance of no. (2), the *Knoll* court stated in effect that a requirement that candidates *prepay* their estimated shares of section 10012.5 costs, as a condition to having their statements of qualifications included in the voter's pamphlet, would be constitutionally void as a denial of equal protection to those who could not afford the prepayment. In passage no. (4), the court nevertheless declined "to strike down" section 10012.5, as denying equal protection, because it "does not authorize" the exaction of prepayment and "compels" the local agency to include the statements of all candi-

dates in the pamphlet without collecting the estimated cost as a condition *precedent* to their inclusion. The question in this proceeding is whether the statute is void to the extent that, by the District's interpretation, it permits imposition of the condition *subsequent* that candidates must pay the actual cost after the fact. We conclude that it would be void as the District interprets it; and that it must be construed otherwise.

As the *Knoll* court indicated in passage no. (3), the payment of section 10012.5 costs by any candidate is the price of the "advantage" he derives from having his statement of qualifications included in the pamphlet. As expressly stated in the same place, it is constitutionally "impermissible" for a local agency to permit the advantage to accrue to "affluent" candidates who can afford to pay the price, thus "invidiously discriminating" against those who cannot.

The agency is no less "invidiously discriminating" against poor candidates if it collects the price from them after the voter's pamphlet has been printed and distributed. The District would draw the distinction that requiring candidates to *prepay* the price is constitutionally impermissible because it would deny them the advantage of having their statements included, whereas subsequent collection by the agency is constitutional because it does not have this effect. The distinction fails because section 10012.5, as interpreted by the *Knoll* court in passage no. (4), quoted

above, does not permit the agency to withhold the advantage from anyone.

The distinction also fails in light of the authorities, followed by the *Knoll* court in part II of its decision (12 Cal.3d at pp. 344-349), which define the evil of the filing fee requirement as its exclusionary effect in "tending to limit the field of candidates from which voters might choose" (*Bullock v. Carter, supra*, 405 U.S. 134 at p. 143) because "impecunious but serious candidates may be prevented from running." (*Lubin v. Panish, supra*, 415 U.S. 709 at p. 717.) The cost of having a statement of qualifications included in a voter's pamphlet is no less a deterrent to "impecunious but serious candidates" if its collection is deferred.³ Mandatory "postpayment" of the price therefore suffers from the same constitutional infirmity as mandatory prepayment.

The District contends that the constitutional problem is avoided because the "option" feature of section 10012.5, as interpreted by the *Knoll* court in no. (4), quoted above, means that "local agencies have discretion in this area and are under no mandate to pursue collection from the indigent candidate." This argument (the afterpart of which we quote from the memorandum filed in support of the petition) invokes the prospect of uncontrolled judgments as to who is

³It is also more than a de minimis amount by any measure. In the present case, the District recovered a judgment against each real party, for printing and handling costs incurred pursuant to section 10012.5, in the principal amount of \$650. The amount of costs involved in *Knoll* was \$497.90. (12 Cal.3d at p. 351.)

indigent and who is not. The prospect is disquieting in itself. More importantly, the constitutional guaranty of equal protection may not be conferred or withheld by such judgments.

The argument that "indigent candidates" need not pay section 10012.5 costs suggests the further prospect that any one of them who is sued for collection must plead and prove his inability to pay. This prospect, and the attendant feature of public inquisition into the resources of a candidate who resists collection, would aggravate the deterrent effect of a post-payment requirement in any case.

In all events, the filing-fee holding in part II of *Knoll* (12 Cal.3d at pp. 344-349) does not permit a constitutional distinction between "indigent candidates" and others; it establishes that the requirement of a prepaid filing fee is unconstitutional, in the absence of "a reasonable alternative means of access to the ballot, available to all candidates *indigent and nonindigent alike.*" (Italics added.) (*Knoll v. Davidson, supra*, 12 Cal.3d at p. 349; footnote 11, *ibid.* [citing *Donovan v. Brown* (1974) 11 Cal.3d 571].) If a candidate is required to finance the inclusion of his statement of qualifications in the voter's pamphlet, he must pay cash at one time or another; there is no "reasonable alternative means" of financing it.

For the various constitutional reasons stated, we agree with respondent court that section 10012.5 does not permit a local agency to recover from any candidates ("indigent and nonindigent alike"), at any time, the cost of including their statements of qualifications in voter's pamphlet. This issue was not presented in *Knoll*, which involved only the feature of mandatory *prepayment* of the costs as a condition precedent to inclusion. (See passage no. (4), quoted above.) As respondent court consequently did not deviate from *Knoll* in the decision before us, we affirm it. (See, and compare, *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450 at p. 455.)

We reach the same conclusion relative to section 10012.5 upon examination of its language as a matter of statutory interpretation short of constitutional dimensions. We describe this result as an alternative ground of our decision.

As the *Knoll* court construed the statute in passage no. (4) quoted above, it does not "compel the local agency to collect the actual cost" of including candidates' statements in the voter's pamphlet; it merely "permits" the agency "to bill" the candidates "at its option." We find in the permissive language a deliberate statutory scheme whereby a candidate may *voluntarily* pay his share of the cost upon being informed,

through a "bill" from the agency, of the precise amount which is attributable to his individual statement of qualifications.⁴ To this extent, the scheme serves the "legitimate state interest in collecting the actual cost" to which the *Knoll* court referred in passage no. (1).

At the same time, we do not interpret the permissive language as imposing upon a candidate the *legal liability* for the costs which would be indispensable to their recovery in a collection action brought against him by the agency. The concept that he might be legally liable for his "share" is dispelled by the *Knoll* construction of the statute, also expressed in passage no. (4) quoted above, that he may be billed by the agency "at its option." His liability for the costs would be to the public personified by the agency, and the enforcement of money liability to the public may not plausibly be left at the "option" of public officials.

Additionally, and although the Legislature has been explicit in authorizing actions and special proceedings in other contexts involving the election laws,⁵ section 10012.5 does not expressly authorize a local agency to sue affected candidates for the recovery of

⁴This interpretation makes the "bill" a call to honor rather than to account, but the concept is no means implausible as a matter of legislative intent. Many candidates will pay the "bill" as a matter of honor. Others may be motivated to pay by the political realities of their situation. This is true of winners in any case, and it is equally true of losers who may wish to try again. The record before us supports the inference that one 1974 candidate paid a \$650 "bill" sent her by the District.

⁵See, e.g., Elections Code sections 407-408, 709, 3576, 10015, 11603, 11605, 11709, 20080-20086, 20331-20338, 20364-20376.

the costs contemplated by the statute. The authority to do this may not be found in conventional principles of restitution. The costs are not collectible in an action brought by the agency upon any common law theory, because all election laws—section 10012.5 included—are exclusively the creatures of statute and have no common law origins. (*Taylor v. Beckham* (1900) 178 U.S. 548, 577; cf. *People ex rel. McKune v. John B. Weller* (1858) 11 Cal. 49, 61.)

An action to recover the costs from candidates may not be maintained by the agency upon the broad authority of Civil Code section 1428, which permits the enforcement of "[a]n obligation arising from operation of law . . . by civil action or proceeding" not defined by statute (see *Paxton v. Paxton* (1907) 150 Cal. 667, 670), because its language is coextensive with the statutory maxim, stated in Civil Code section 3523, that "[f]or every wrong there is a remedy." (2 Witkin, *Procedure, op. cit. supra*, Actions, §§ 3-5, pp. 881-883.) There is no "wrong" involved, and no "remedy" lies, if a candidate need not pay the cost of having his statement of qualifications printed in the voter's pamphlet distributed by the local agency. The only consequence is that the cost must be paid by the agency. It is entirely reasonable that the financial burden of elections be borne by the taxpaying voters who participate in them. (Cf. *Bullock v. Carter*, *supra*, 405 U.S. 134 at pp. 148-149.) We conclude, apart from the constitutional considerations discussed

above, that section 10012.5 may not be interpreted as permitting a local agency to bring an action for recovery of the costs it incurs under compulsion of the statute.

The judgment of respondent court is affirmed.

CERTIFIED FOR PUBLICATION.

RATTIGAN, ACTING P. J.

WE CONCUR:
CHRISTIAN, J.
RAGAN, J.*

*Assigned by the Chairperson of the Judicial Council.

APPENDIX C

IN THE
 SUPERIOR COURT
 OF THE
 STATE OF CALIFORNIA
 IN AND FOR THE
 COUNTY OF ALAMEDA

APPELLATE DEPARTMENT

Endorsed Filed Jan. 3, 1977, Rene Davidson,
 County Clerk. By Nanci E. Alvarez

ROBERT KAHN, et al.,
Defendants and Appellants,
 VS.
 EAST BAY MUNICIPAL UTILITY DISTRICT,
Plaintiff and Respondent.

No. 943
DECISION

Glen L. Moss for Appellants.

John B. Reilley for Respondent.

Appellants were candidates for election to Respondent's Board of Directors in the election of November 5, 1974. After the election, they were billed *pro rata* for the expenses of including their respective statements of qualification in the pamphlet distributed to the voters with the sample ballots. Appellants Kahn and Naparst, who had requested that a Spanish translation be included, were billed \$1300 each. Appellant Perry, who had not made such a request, was billed \$650. Upon their refusal to make such payments, judgment was rendered against them in those amounts, plus interest.

At the time in question, Elections Code Section 10,012.5 (since renumbered as 10,012) provided that the clerk

"shall provide a Spanish translation to those candidates who wish to have one, and shall select a person or provide such translation from the list of approved Spanish language translators and interpreters of the superior court of the county or from an institution accredited by the Western Association of School and Colleges."

The section also stated that

"The local agency may bill each candidate availing himself of these services a sum not greater than the actual prorated costs. . . ."

Appellants contend (1) that they should have been permitted to submit their own translations, and (2) that in any event requiring them to pay the cost is a denial of constitutional rights.

The first contention (which involves only an unspecified portion of the judgment covering the translation expense) would deny the right of the Legislature to insure a proper quality of translation through the use of accredited translators. Erroneous translation reflects adversely on the governmental agency which issues the pamphlet. Many voters will assume that the agency is responsible for the translation; and any offense they take from inaccurate or perhaps

ludicrous and possibly even insulting errors in translation might be directed at the governing agency rather than the candidate. In addition, the clerk's statutory responsibility to reject obscene, vulgar, profane, libelous, etc., matters requires the use of translators accountable to him. The Legislature clearly had a valid interest in enacting this requirement. The first contention is not well taken.

The second presents a more difficult problem. Prior to the election in question, the Supreme Court of the State held, in *Knoll v. Davidson*, 12 C. 3d 335 (August 15, 1974), that Section 10,012.5 did not authorize the clerk to require prepayment of such costs as a condition of including a candidate's statement in the pamphlet. The statute *compels* the local agency (by use of the mandatory word "shall") to distribute the statement but merely *permits* the local agency (by use of the discretionary term "may") to bill the candidate, at its option.

This interpretation of the statute avoided the necessity of holding the statute unconstitutional, as a discrimination against candidates unable to prepay the cost. The case leaves undecided the question whether a subsequent collection action (such as we have here) runs afoul of the same constitutional principle. The language and reasoning of the opinion suggest that it does. The Court points out that, under *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), ". . . an election sys-

tem which prescribes filing fees as the exclusive means of obtaining a place on the ballot cannot pass constitutional muster since it violates the equal protection clause of the federal Constitution." (12 C. 3d at 348).

In response to *Lubin v. Panish, supra*, the California Legislature adopted a procedure giving candidates the option of qualifying for the ballot by submitting a petition signed by a specified number of registered voters in lieu of a filing fee. The discretionary authorization for billing the candidates for their statements of qualifications remains unchanged, however, except that the local agency must announce before the opening of the nomination period whether such a charge will be made. (Elec. Code Sec. 10,012, as amended in 1975.)

It is obvious that the obligation to pay such costs eventually places less affluent candidates at a disadvantage. The opportunity to avoid payment by subsequently declaring bankruptcy is not an equalizing factor for one who is seeking public office and may hope to do so again in the future. Nor does the possibility of avoiding the obligation by filing a pauper's oath provide a satisfactory alternative. Many potential candidates could reasonably consider publication costs of the size involved here an unacceptable financial burden even though they could not conscientiously view themselves as indigent. Whether the obligation must be met before or after the election, its existence

gives ". . . an unfair advantage to the affluent and invidiously [discriminates] against those unable to afford the substantial fees." *Knoll v. Davidson*, 12 C. 3d at 352.

Accordingly, the judgment is reversed.

APPENDIX D

IN THE
SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF ALAMEDA

APPELLATE DEPARTMENT

Filed March 28, 1977, Rene Davidson, County Clerk
By Nanci E. Alvarez, Deputy

ROBERT KAHN, et al.,
Defendants and Appellants,

vs.
EAST BAY MUNICIPAL UTILITY DISTRICT,
Plaintiff and Respondent.

CIVIL
No. 943

DECISION
ON
REHEARING

Glen L. Moss for Appellants.

John B. Reilley for Respondent.

Appellants were candidates for election to Respondent's Board of Directors in the election of November 5, 1974. After the election, they were billed *pro rata* for the expenses of including their respective statements of qualification in the pamphlet distributed to the voters with the sample ballots. Appellants Kahn and Naparst, who had requested that a Spanish translation be included, were billed \$1300 each. Appellant Perry, who had not made such a request, was billed \$650. Upon their refusal to make such payments,

judgment was rendered against them in those amounts, plus interest.

Respondent provides water to users in Alameda and Contra Costa counties. Its directors serve four-year terms at a compensation of \$40.00 per month. Initially, by resolution of its Board of Directors on July 23, 1974, candidates were required to deposit \$2600 if they submitted a candidate statement, plus an additional \$2600 if they desired a Spanish translation. Following the decision in *Knoll v. Davidson*, 12 C. 3d 335, on August 15, 1974, this resolution was amended on August 27, 1974, to eliminate the deposit requirement and substitute a provision for subsequent billing of the actual cost.

At the time in question, Elections Code Section 10,012.5 (since renumbered as 10,012) authorized each candidate in a local election to submit to the clerk a 200-word statement of qualifications, required the clerk to include this statement in a voter's pamphlet sent to the voters with sample ballot, and further provided that the clerk

"shall provide a Spanish translation to those candidates who wish to have one, and shall select a person or provide such translation from the list of approved Spanish language translators and interpreters of the superior court of the county or from an institution accredited by the Western Association of School and Colleges."

Appellants contend (1) that they should have been permitted to submit their own translations, and (2) that in any event requiring them to pay the cost is a denial of constitutional rights.

The first contention (which involves only an unspecified portion of the judgment covering the translation expense) would deny the right of the Legislature to insure a proper quality of translation through the use of accredited translators. Erroneous translation reflects adversely on the governmental agency which issues the pamphlet. Many voters will assume that the agency is responsible for the translation; and any offense they take from inaccurate or perhaps ludicrous and possibly even insulting errors in translation might be directed at the governing agency rather than the candidate. In addition, the clerk's statutory responsibility to reject obscene, vulgar, profane, libelous, etc., matter requires the use of translators accountable to him. The Legislature clearly had a valid interest in enacting this requirement. The first contention is not well taken.

The second presents a more difficult problem. It involves a conflict between an understandable concern that the candidate, rather than the public, should bear the cost of distributing the statement of qualifications, and the constitutional inhibition, through the equal protection clause, of providing wealthy candidates a ballot advantage over those of more modest means. As stated in *Knoll v. Davidson*, 12 C. 3d at 352,

"The voter's pamphlet, which accompanies the sample ballot, purports to be an authoritative document that appears to give an imprimatur of official approval to statements of qualifications included therein. It is quite likely that this document would carry greater weight in the minds of the voters than normal campaign literature and that candidates who do not have their statements of qualifications in it would appear to be lacking in official sanction. In short, it seems likely that candidates who have their statements of qualifications included in the voter's pamphlet have a clear advantage over candidates who do not."

That case, which was decided prior to the election involved in this one, dealt with two matters. One was the constitutionality of various Elections Code sections requiring the payment of filing fees as a condition of becoming a candidate. The other was "whether the alleged statutory requirement [in Section 10,012.5] of prepayment of the prorated cost of printing and handling of the candidates' statements of qualifications in the voter's pamphlet passes constitutional muster." (12 C.3d at 338)

The filing fee requirement was held unconstitutional, in accordance with *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974). The decision was not based on indigency, but rather on the ground that the filing fee requirement was invalid because it did not include "a reasonable

alternative means of access to the ballot, available to all candidates indigent and nonindigent alike." 12 C. 3d at 349. See also *Donovan v. Brown*, 11 C. 3d 571 (1974). As the Court noted, the California Legislature had already enacted, in response to *Lubin v. Panish*, an alternative means of access to the ballot by submitting a petition signed by a specified number of voters in lieu of a filing fee.

As to the question of prepayment of the cost of the statement of qualifications, the Court said it was "clear that the county cannot constitutionally make this service available only to affluent candidates, while denying it to less affluent ones." (12 C. 3d at 352)

After pointing to the advantage which a candidate whose statement of qualifications is included in the voter's pamphlet enjoys over those who do not have such a statement, the Court said (12 C. 3d at 352):

"It is impermissible for the state or local agency involved to deny this opportunity solely on the basis of wealth, thereby giving an unfair advantage to the affluent and invidiously discriminating against those unable to afford the substantial fees. Therefore in the present case the county cannot constitutionally require that a candidate pay a fee equal to his pro rata share of the printing and handling costs as a condition to having his statement of qualifications included in the voter's pamphlet."

The Court concluded, however, that it was not necessary to strike down Section 10012.5 because it did authorize a prepayment system. While it requires the clerk to distribute the candidate's statement, it does not authorize collection of the *estimated* cost. It merely permits the local agency, at its option, to bill each candidate for the actual prorated cost. It does not even compel the local agency to collect the actual cost.

In view of this construction of Section 10012.5, the clerk was obligated, in *Knoll v. Davidson*, as well as in this case, to accept the candidates' statements without requiring payment of the estimated cost.

We are now faced with the question of whether candidates who refuse to pay the prorated actual cost for which the agency chooses to bill them later on can constitutionally be subjected to a collection action.

If we were to be guided solely by the reasoning of *Knoll v. Davidson*, it would seem clear that enforced collection would be constitutionally impermissible. It is obvious that potential candidates of modest means who are otherwise as well-qualified and as deserving of voter consideration as more affluent ones will be discouraged from submitting a candidate's statement if they know that they will eventually have to pay the cost. The opportunity to avoid payment by subsequently declaring bankruptcy is not an equalizing factor for one who is seeking public office and

may hope to do so again in the future. Nor does the possibility of avoiding the obligation by filing a pauper's oath provide a satisfactory alternative. See *Donovan v. Brown*, *supra*. Many potential candidates could reasonably consider publication costs of the size involved here an unacceptable financial burden even though they could not conscientiously view themselves as indigent. Whether the obligation must be met before or after the election, its existence gives ". . . an unfair advantage to the affluent and invidiously [discriminates] against those unable to afford the substantial fees." *Knoll v. Davidson*, 12 C. 3d at 352.

Unfortunately, the decision is not that clear. Although the actual holding in *Knoll v. Davidson* does not go beyond a determination that the statute does not authorize a prepayment demand, the language of the opinion does. In the introductory part of the opinion, the Court states (12 C. 3d at 338):

"We further hold that although prepayment of the prorated cost . . . may not be constitutionally required, the statute in question constitutionally permits the candidate to be billed for such cost after the voter's pamphlet has been printed and distributed."

And at page 351, the opinion states:

"It appears clear that the county need not be compelled to pay the cost of providing this service of printing and mailing candidates' statements of qualifications and that, as indi-

cated in Bullock, the county has a legitimate state interest in collecting the actual cost of providing such a service."

But that language is followed immediately by the following sentence:

"However, it appears equally clear that the county cannot constitutionally make this service available only to affluent candidates while denying it to less affluent ones."

In addition, as quoted earlier, the opinion describes the contents of the voter's pamphlet as carrying "an imprimatur of official approval," bearing "greater weight in the minds of the voters than normal campaign literature," connoting a lack of "official sanction" to candidates for whom no statement appears, and providing "a clear advantage" to those whose statements are included.

These statements, as well as others quoted above as the rationale for the conclusion that a prepayment scheme would be unconstitutional, are inconsistent with the statement that the local agency may constitutionally *bill* the candidate later on, unless the Court meant to draw a distinction between sending a bill and compelling payment by judicial action.

Faced with what to us appears to be an inconsistency between a *dictum* and the announced rationale of the actual holding, we choose to follow the rationale in deciding this case. The state need not

make the voter's pamphlet available for such statements, but if it chooses to do so it cannot interpose eventual payment of a substantial sum as a realistic condition of its availability to candidates. If the justification for printing such statements at all is that it helps the electorate make a more intelligent choice, public policy as well as constitutional equality requires that the pamphlet be available to all candidates, regardless of monetary affluence, either by eliminating the cost or by some reasonable means other than the payment of money (such as the amendment to Elections Code Section 6555 enacted in 1974 in response to *Lubin v. Panish, supra*, provides as an alternative to filing fees).

Accordingly the judgment is reversed.

Because the issue is one of considerable statewide concern and needs to be resolved with greater finality than we can provide, we shall also certify the case to the Court of Appeals for the First Appellate District for its consideration, pursuant to Rule 63 of Rules of Court.

SPURGEON AVAKIAN,
PRESIDING JUDGE

GEORGE W. PHILLIPS, JR.,
ASSOCIATE JUDGE

See Concurring and Dissenting Opinion of Associate Judge Sutton attached hereto.

IN THE
SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN AND FOR THE
COUNTY OF ALAMEDA

APPELLATE DEPARTMENT

Filed March 28, 1977, Rene Davidson, County Clerk
By Nanci E. Alvarez, Deputy

ROBERT KAHN, et al.,
Defendants and Appellants,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT,
Plaintiff and Respondent.

CIVIL
No. 943
**CONCUR-
RING AND
DISSENTING
OPINION**

I concur with the majority in rejecting appellants' contention that they should have been permitted to submit their own translations of statements of candidates' qualifications.

However, I dissent from the majority in its reversal of the trial court on the grounds that requiring candidates to pay the cost of distributing statements of qualifications is a deprivation of constitutional rights.

The majority opinion reversing the trial court is based on the erroneous premise that the reasoning of *Knoll v. Davidson*, 12 C.3d 335, clearly bars subsequent enforced collection of costs, even though the

opinion states that the local agency may constitutionally bill the candidate later on. These two positions are regarded by the majority as inconsistent unless the court in *Knoll* meant to draw a distinction between sending a bill and compelling payment by judicial action.

According to the majority, the language in *Knoll* authorizing billing is dicta, the rationale of the case constitutionally prohibits subsequent collection of costs, and the judgment of the trial court for such costs is reversed.

While it found that the petitioner had received the immediate relief requested, the court in *Knoll* (at 344) nevertheless undertook to resolve the constitutional issues raised, finding general public interest in uniform application of the election laws.

Under these circumstances the detailed discussion and holding (*Knoll*, page 338 and page 353) that the statute (10012.5, *Election Code*) constitutionally permits the candidate to be billed for costs after the voter's pamphlet has been printed and distributed cannot be regarded as dicta.

Further, the court in *Knoll* states that subsequent collection of actual costs of candidates' statements of qualifications is constitutionally sanctioned (page 351):

"It appears clear that the county need not be compelled to pay the cost of providing this serv-

ice of printing and mailing candidates' statements of qualifications and that, as indicated in *Bullock*, the county has a legitimate state interest in *collecting* the actual cost of providing such a service."

(Emphasis added.)

Following well-established rules of statutory interpretation ("a construction making some words surplusage is to be avoided.") (*Moyer v. Workmen's Comp. Appeals Bd.*, 10 C.3d 222, at 230), the *Knoll* court expressly upheld the billing provisions of 10012.5. By reversing the trial court, the majority herein prohibits collection and thereby renders statutory reference to "billing" surplusage.

Conversely, had the *Knoll* court believed that such an interpretation of the statute gave an unfair advantage to the affluent, it would have declared both the billing provisions and the filing fee requirements unconstitutional. It did not.

While the *Knoll* decision may have left open what happens in the case of an indigent from whom collection is sought, no candidate in the instant case has asserted nor asserts any lack of financial ability to pay. That issue should be reserved until such time as it is presented.

In brief, the rationale and language of the *Knoll* opinion are inconsistent, as the majority holds, only if it can be said that by expressly authorizing billing

the court impliedly prohibited collection. The existence of such an inconsistency finds no support in law or reason. I would, therefore, affirm the judgment of the trial court in favor of respondent.

ZOOK SUTTON
ASSOCIATE JUDGE

IN THE
SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
IN FOR THE
COUNTY OF ALAMEDA

APPELLATE DEPARTMENT

Filed March 28, 1977, Rene C. Davidson, County Clerk
By Nanci E. Alvarez, Deputy

ROBERT KAHN, et al.,
Defendants and Appelants,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT,

CIVIL
No. 943

CERTIFI-
CATION TO
COURT OF
APPEAL

This is an appeal from a judgment requiring the defendants to pay their *pro rata* share of the costs of printing and distributing in the voter's pamphlet their statements as candidates for the Board of Directors of plaintiff agency.

Elections Section 10,012.5 (since renumbered as 10,012) requires that such a statement (including a Spanish translation) be distributed at the request of the candidate and authorizes the local agency, at its option, to bill each candidate for a *pro rata* portion of the actual cost. In *Knoll v. Davidson*, 12 C. 3d 335, it was held that the statute did not authorize collection of the estimated cost in advance. The language and reasoning of the case was to the effect that the statute would be unconstitutional if it required pre-payment as a condition of having the statement distributed.

The issue in this case is whether the subsequent collection of such cost is constitutionally impermissible. There is no appellate court decision in which this precise question has been decided. The pertinent facts of the case, and the views of the judges of the Appellate Department of this Court, are set forth in the Decision on Rehearing and the Dissenting Opinion attached to this certification.

The problem is one of continuing importance in view of the many local elections throughout the state which are subject to the provisions of currently numbered Section 10,072 of the Elections Code. Accordingly, the case is certified and transferred to the

Court of Appeal of the State of California for the First Appellate District, in order to settle the important question of law defined above.

Dated: March 25, 1977.

SPURGEON AVAKIAN,
PRESIDING JUDGE

GEORGE W. PHILLIPS, JR.,
ASSOCIATE JUDGE

ZOOK SUTTON,
ASSOCIATE JUDGE

APPENDIX E

(Logo)

THE SUPERIOR COURT

200 W. Compton Boulevard

Compton, California 90220

Chambers of

James M. Ideman, Judge

(Personal)

Telephone

(213) 603-7000

April 10, 1979

Glenn L. Moss, Esq.
22693 Hesperian
Hayward, CA 94541

Dear Mr. Moss:

In response to your question concerning the cost of candidate statements for county-wide candidates in Los Angeles County, I can advise you as follows:

My bill for the June 6 Primary was \$11,144.92, and my bill for the November 7 General Election was \$10,450.26, for a grand total of \$21,595.18.

I need not tell you what a burden it is for a judicial candidate to have to pay these kinds of fees out of his own pocket. Your interest and efforts are very much appreciated.

Very truly yours,
JAMES M. IDEMAN